

1 HONORABLE RONALD B. LEIGHTON
2
3
4
5
6
7

8
9
10
11
12 UNITED STATES DISTRICT COURT
13 WESTERN DISTRICT OF WASHINGTON
14 AT TACOMA
15

16 QWEST CORPORATION, dba
17 CENTURYLINK QC, a Colorado
18 corporation,
19
20

21 Plaintiff,
22
23 v.
24

25 GONZALEZ BORING & TUNNELING
26 CO., INC., an Oregon Corporation; and
27 SCARSELLA BROS., INC., a
28 Washington Corporation,
29
30

31 Defendant.
32
33

34 CASE NO. 3:18-cv-05396-RBL
35
36 ORDER
37
38

39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
990
991
992
993
994
995
996
997
998
999
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
1010
1011
1012
1013
1014
1015
1016
1017
1018
1019
1010
1011
1012
1013
1014
1015
1016
1017
1018
1019
1020
1021
1022
1023
1024
1025
1026
1027
1028
1029
1020
1021
1022
1023
1024
1025
1026
1027
1028
1029
1030
1031
1032
1033
1034
1035
1036
1037
1038
1039
1030
1031
1032
1033
1034
1035
1036
1037
1038
1039
1040
1041
1042
1043
1044
1045
1046
1047
1048
1049
1040
1041
1042
1043
1044
1045
1046
1047
1048
1049
1050
1051
1052
1053
1054
1055
1056
1057
1058
1059
1050
1051
1052
1053
1054
1055
1056
1057
1058
1059
1060
1061
1062
1063
1064
1065
1066
1067
1068
1069
1060
1061
1062
1063
1064
1065
1066
1067
1068
1069
1070
1071
1072
1073
1074
1075
1076
1077
1078
1079
1070
1071
1072
1073
1074
1075
1076
1077
1078
1079
1080
1081
1082
1083
1084
1085
1086
1087
1088
1089
1080
1081
1082
1083
1084
1085
1086
1087
1088
1089
1090
1091
1092
1093
1094
1095
1096
1097
1098
1099
1090
1091
1092
1093
1094
1095
1096
1097
1098
1099
1100
1101
1102
1103
1104
1105
1106
1107
1108
1109
1100
1101
1102
1103
1104
1105
1106
1107
1108
1109
1110
1111
1112
1113
1114
1115
1116
1117
1118
1119
1110
1111
1112
1113
1114
1115
1116
1117
1118
1119
1120
1121
1122
1123
1124
1125
1126
1127
1128
1129
1120
1121
1122
1123
1124
1125
1126
1127
1128
1129
1130
1131
1132
1133
1134
1135
1136
1137
1138
1139
1130
1131
1132
1133
1134
1135
1136
1137
1138
1139
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1190
1191
1192
1193
1194
1195
1196
1197
1198
1199
1190
1191
1192
1193
1194
1195
1196
1197
1198
1199
1200
1201
1202
1203
1204
1205
1206
1207
1208
1209
1200
1201
1202
1203
1204
1205
1206
1207
1208
1209
1210
1211
1212
1213
1214
1215
1216
1217
1218
1219
1210
1211
1212
1213
1214
1215
1216
1217
1218
1219
1220
1221
1222
1223
1224
1225
1226
1227
1228
1229
1220
1221
1222
1223
1224
1225
1226
1227
1228
1229
1230
1231
1232
1233
1234
1235
1236
1237
1238
1239
1230
1231
1232
1233
1234
1235
1236
1237
1238
1239
1240
1241
1242
1243
1244
1245
1246
1247
1248
1249
1240
1241
1242
1243
1244
1245
1246
1247
1248
1249
1250
1251
1252
1253
1254
1255
1256
1257
1258
1259
1250
1251
1252
1253
1254
1255
1256
1257
1258
1259
1260
1261
1262
1263
1264
1265
1266
1267
1268
1269
1260
1261
1262
1263
1264
1265
1266
1267
1268
1269
1270
1271
1272
1273
1274
1275
1276
1277
1278
1279
1270
1271
1272
1273
1274
1275
1276
1277
1278
1279
1280
1281
1282
1283
1284
1285
1286
1287
1288
1289
1280
1281
1282
1283
1284
1285
1286
1287
1288
1289
1290
1291
1292
1293
1294
1295
1296
1297
1298
1299
1290
1291
1292
1293
1294
1295
1296
1297
1298
1299
1300
1301
1302
1303
1304
1305
1306
1307
1308
1309
1300
1301
1302
1303
1304
1305
1306
1307
1308
1309
1310
1311
1312
1313
1314
1315
1316
1317
1318
1319
1310
1311
1312
1313
1314
1315
1316
1317
1318
1319
1320
1321
1322
1323
1324
1325
1326
1327
1328
1329
1320
1321
1322
1323
1324
1325
1326
1327
1328
1329
1330
1331
1332
1333
1334
1335
1336

1 #13, at 8. It then goes on to allege that “to the extent that” UtiliQuest provided such locations and
2 markings Gonzalez relied on them and requests contribution under RCW 4.22.040.” *Id.*

3 UtiliQuest argues that the contribution claim in the Third-Party Complaint must be
4 dismissed because it fails to plausibly allege that UtiliQuest actually provided any locating or
5 marking services for the project. UtiliQuest provides several declarations to the effect that in fact
6 Locating, Inc., provided locating and marking services and not UtiliQuest. UtiliQuest also argues
7 that any claim against it is legally deficient because, under RCW 19.122.030, a locate request
8 remains valid for only 45 days after the initial request. After that, an excavator is required to
9 provide additional notice to the locator service. UtiliQuest asserts that, because the utilities were
10 located and marked on March 9 but excavation did not commence until May 19, the 45 day limit
11 had expired and Gonzalez could not have relied on UtiliQuest’s locates or marks.

12 Gonzalez “does not dispute that Locating, Inc., marked CenturyLink’s facilities” and asks
13 for leave to amend its Third-Party Complaint to substitute Locating, Inc., for UtiliQuest as the
14 proper third-party defendant. Dkt. #36, at 5. However, Gonzalez also contends that its Third-
15 Party Complaint gives “more than adequate notice” to comply with Rule 8(a). In addition,
16 Gonzalez argues that its compliance with RCW 19.122.030 is not dispositive of whether either
17 UtiliQuest or Locating, Inc., are liable for contribution under RCW 4.22.040.

18 Dismissal under Fed. R. Civ. P. 12(b)(6) may be based on either the lack of a cognizable
19 legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri*
20 *v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff’s complaint must allege
21 facts to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662,
22 678 (2009). A claim has “facial plausibility” when the party seeking relief “pleads factual
23 content that allows the court to draw the reasonable inference that the defendant is liable for the
24

1 misconduct alleged.” *Id.* Although the court must accept as true the Complaint’s well-pled facts,
2 conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper
3 12(b)(6) motion to dismiss. *Vazquez v. Los Angeles Cty.*, 487 F.3d 1246, 1249 (9th Cir. 2007);
4 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “[A] plaintiff’s obligation
5 to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions,
6 and a formulaic recitation of the elements of a cause of action will not do. Factual allegations
7 must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*,
8 550 U.S. 544, 555 (2007) (citations and footnotes omitted). This requires a plaintiff to plead
9 “more than an unadorned, the-defendant-unlawfully-harmed-me-accusation.” *Iqbal*, 556 U.S. at
10 678 (citing *id.*).

11 On a 12(b)(6) motion, “a district court should grant leave to amend even if no request to
12 amend the pleading was made, unless it determines that the pleading could not possibly be cured
13 by the allegation of other facts.” *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242,
14 247 (9th Cir. 1990). However, where the facts are not in dispute, and the sole issue is whether
15 there is liability as a matter of substantive law, the court may deny leave to amend. *Albrecht v.*
16 *Lund*, 845 F.2d 193, 195–96 (9th Cir. 1988).

17 Here, Gonzalez concedes that it named the wrong third-party defendant and would like to
18 supplement Locating, Inc., for UtiliQuest. Such an amendment is permissible under Rule
19 15(a)(2). However, UtiliQuest is correct that, aside from naming the wrong defendant,
20 Gonzalez’s Third-Party Complaint also does not meet the plausibility standard in other respects.
21 Namely, Gonzalez’s indeterminate phrasing that UtiliQuest is liable “to the extent that” it
22 provided locating and marking services is overly speculative. *See Twombly*, 550 U.S. at 555. The
23 allegations in a complaint need not include every possible detail, but they do need to assert with
24

1 certainty that the defendant did in fact do something that could result in liability. Gonzalez
2 should also address this shortcoming in its amended complaint.

3 UtiliQuest's argument that amendment would be futile because Gonzalez did not comply
4 with the timing requirements of RCW 19.122.030 is unpersuasive. As Gonzalez points out, it
5 was sued for negligence, not violation of RCW 19.122.030. Dkt. #1, at 3-4. Consequently,
6 whether or not Gonzalez complied with RCW 19.122.030 may be relevant to an argument
7 concerning breach but is not the only method of proving it. *See* RCW 5.40.050 (breach of a duty
8 imposed by statute, ordinance, or administrative rule shall be considered evidence of negligence
9 and not negligence *per se*); *Damasco v. United States*, No. C17-641 RSM, 2018 WL 4237752, at
10 *6 (W.D. Wash. Sept. 6, 2018). If Locating, Inc., negligently provided locates or marks that
11 Gonzalez then relied on, Locating, Inc., could still be liable for contribution under
12 RCW 4.22.040 even if Gonzalez also negligently waited too long after the locates and marks
13 were initially placed. UtiliQuest's insistence that RCW 5.40.050 must impose a separate duty on
14 Locating, Inc., for it to be liable is somewhat baffling. Whether or not Locating, Inc., owed a
15 duty under the law of negligence is a separate question that is unrelated to RCW 19.122.030 and
16 RCW 5.40.050, and if Locating, Inc., affirmatively provided locating and marking services for
17 the project, UtiliQuest has provided no reason why it could not owe a duty.

18 //

19 //

20 //

21 //

22 //

23

24

1 For these reasons, UtiliQuest's Motion to Dismiss without Leave to Amend [Dkt. #33] is
2 DENIED. Gonzalez shall file an amended complaint within 21 days of this ORDER.

3 IT IS SO ORDERED.

4 Dated this 7th day of March, 2019.

5 
6

7 Ronald B. Leighton
8 United States District Judge

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24